PUBLIC BANK BHD

v.

KEMAJUAN FLORA SDN BHD & INTERVENER

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[ORIGINATING SUMMONS NO: 24-90-1998]
8 JUNE 2001

LAND LAW: *Sale of land - Auction - Setting aside auction sale - Prerequisite requirements - Whether sale contravened substantive statutory prohibition - Whether there was non-service of order for sale - Proclamation of sale - Proclamation of sale served on solicitor but not on proprietor - Whether constituted good service - National Land Code 1965, s. 258(1)(b) - Rules of the High Court 1980, O. 12 r. (1)(2), O. 32 r. 13(2)(b)*

CIVIL PROCEDURE: *Notice - Service - Notice served on solicitor - Whether constituted actual notice to client - Whether solicitor alter ego of client*

The defendant, the registered proprietor of three pieces of land in Alor Gajah, Melaka ('the land'), had charged the land to the plaintiff. By an order dated 31 July 1998, the court ordered that the land be sold by way of public auction. The auction however was unsuccessful, just as three other attempts made pursuant to court orders dated 3 March 1999, 17 June 1999 and 28 September 1999 respectively ('the three orders'). It was not in dispute the three orders were made *inter partes* where both the plaintiff and the defendant were represented by counsel. It was also not in dispute that, on all the *inter partes* hearings, the defendant had expressed no objection whatsoever in respect of the order/orders for sale.

On 17 April 2000, the court made another order that the land be sold by public auction on 26 June 2000 ('the auction sale'). This time around the auction was successful whereupon the land was sold to the intervener herein for RM4,203,000. A certificate of sale was issued by the court subsequently on 30 September 2000.

In the meanwhile, on 14 August 2000, the defendant filed the present summons in chambers ('encl. 79') and applied for an order that the auction sale be set aside for being a nullity and for contravening s. 258(1) of the National Land Code 1965 ('NLC'). According to the defendant, the plaintiff had not served the relevant proclamation of sale on them as ordered, and therefore had not complied with the court order of 17 April 2000. Subsequently, on

8 December 2000, the defendant also averred, for the first time, by way of an affidavit in reply, that the auction sale was further defective as the order for sale dated 31 July 1998 had also not been served on them.

Before the learned judicial commissioner, the plaintiff and the intervener argued *inter alia* that encl. 79 ought to be dismissed as: (i) though the proclamation of sale was not served on the defendant, it was served on the defendant's solicitor; (ii) having been represented by counsel when the three orders were made, and having not objected to the same then, it was not open for the defendant to now complain about non-service of the order of 31 July 1998.

Held:

[1] Non-service of the order for sale was never mentioned as a ground in support of encl. 79. If it was indeed really a ground and was intended to be so, it should have been disclosed in encl. 80 (the first affidavit filed in support of encl. 79) or at the latest in encl. 90 herein.
(p 636 f)

[2] If the defendant had really not been served with the order for sale of 31 July 1998, the defendant ought to have raised the issue in the summons for direction proceedings on 3 March 1999. Failing that, the defendant could still have raised the issue in the proceedings of 17 June 1999, or 28 September 1999 or 17 April 2000. In none of these proceedings, however, had the matter been raised by the defendant. It was only after a lapse of some two years, on 8 December 2000, that the matter was raised *vide*. encl. 89 herein. The defendant cannot be allowed to do so. (p 638 b-c)

[2a] In any case, on the facts and in the circumstances, the court must reject the allegation that the defendant had never been served with the order for sale as inherently improbable. Being represented by counsel on 31 July 1998 when the order for sale was made, as well as on four subsequent occasions when further orders for sale were made, the defendant cannot now be heard to say that they did not know what the order for sale was all about.
(p 683 e)

[3] Section 258(1)(b) NLC does not require the proclamation of sale to be served on the defendant. There is therefore no merit in the contention that non-service of the proclamation sale, if proven, would constitute a breach of statutory provision.
(p 639 i)

[4] The auction sale is a matter which must be part of the duty of the defendant's solicitor to be aware of or inform the defendant. In this case, the proclamation of sale in respect of the auction sale was served on the defendant's solicitor at the material time, M/s. Bala Gopal & Associates, on 5 June 2000. Such service was good service and must in law amount to service of the proclamation on the defendant. The service also constituted sufficient compliance with para. 6 of the court order dated 17 April 2000. (p 641 d-e)

[5] In order to set aside the auction sale, the defendant must show that there was a failure on the part of the plaintiff which contravened a substantive statutory prohibition rendering the auction sale null and void, or that such failure was of such a serious nature that justice demands that the auction sale be set aside. The court's inherent and discretionary jurisdiction to set aside the auction sale will not be applied if the failure was only a defect in relation to a procedural requirement of the law. (p 639 d-e)

[5a] The present case is not a case in which there has been a defect amounting to a blatant defiance of a substantive statutory prohibition rendering the auction sale null and void on ground of illegality or lack of jurisdiction. This is also not a case in which there has been a defect of such a serious nature warranting the setting aside of the auction sale. (p 644 g)

[Application dismissed.]

Case(s) referred to:

Aik Meng (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 ***(foll)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***

Dixon v. Winch [1900] 1 Ch 736 ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(foll)***

Gentali (M) Bhd v. Kawasaki Sunrock Sdn Bhd [1996] 4 CLJ 813 ***(refd)***

Getz Brothers & Co GMBH v. Pan Malaysian Wood Products Sdn Bhd [1980] 2 MLJ 79 ***(refd)***

Hock Thai Finance Corporation Bhd v. Tai Chou Yu [2000] 5 CLJ 314 ***(refd)***

Khor Kim Yong v. Public Bank Bhd & Anor [1998] 1 CLJ 668 ***(dist)***

KS Chua & Co v. Chiu Huang Chew [1995] 4 MLJ 436 ***(refd)***

Lady De Pole v. Dick [1885] 29 Ch D 351 ***(foll)***

Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 ***(refd)***

Legione And Anor v. Hateley [1982-1983] 152 CLR 406 ***(foll)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Selvam Holding (M) Sdn Bhd v. Grant Kenyon & Ekhardt Sdn Bhd, BSN Commercial Bank (M) Bhd & Ors (Interveners) [2000] 3 CLJ 16 ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***

Legislation referred to:
National Land Code, s. 258(1)(b)
Rules of the High Court 1980, O. 12 r. 1(2), O. 32 r. 13(2)(a)

For the plaintiff - Caroline Chin; M/s Philip Chua & Co
For the defendant - Nizam Bashir, M/s Bashir & Co
For the intervener - Yap Bell Pung; M/s Bee & Lee

Reported by WA Sharif

JUDGMENT

Ahmad Maarop JC:

The Background

The defendant was the registered owner of the land known as Lot 480, (Geran Pendaftaran No. 5983), Lot No. 654 (Geran Pendaftaran No. 12690) and Lot 655 (Geran Pendaftaran No. 1269), all in Mukim Parit Melana, District of Alor Gajah, Malacca ("the said land). The said land were charged to the plaintiff. On 31 July 1998, the High Court, on the plaintiff's application ordered the sale of the said land by public auction. A number of earlier attempts to effect the sale of the said land failed. On 17 April 2000, the Senior Assistant Registrar of the High Court ordered the land to be sold by auction on 26 June 2000. The intervener successfully bid for and purchased the lands at that auction at the price of RM4,203,000. The intervener had paid the auction price in full and the Registrar of the High Court had issued a certificate of sale dated 30 September 2000. On 14 August 2000, the defendant filed its application in encl. 79. On 24 November 2000 the intervener filed its application in encl. 85.

Both applications were fixed for hearing on 13 December 2000. In the summons in chambers (encl. 79), the defendant asked for the following orders:

(a) Lelongan yang diadakan pada 26 Jun 2000 mengenai tanah yang dikenali sebagai Lot 480, Geran No. 5983. Lot 654, Geran No. 12690 dan Lot 655, Geran No. 12691 Mukim Parit Melaka, Daerah Alor Gajah, Melaka dibatalkan;

(b) Kos permohonan dan kos mengenai lelongan tersebut ditanggung oleh plaintif;

(c) Kos permohonan ini dibayar oleh plaintif kepada defendan.

The other application, ie, the summons in chambers in encl. 85 was filed by the applicant (intervener), asking for the following orders:

(a) Bahawa pemohon iaitu, Pernara Jaya Sdn Bhd dengan ini diberi liberti dan kebenaran untuk interven dalam prosiding mahkamah yang mulia ini;

(b) Bahawa sejurus prayer 1 diatas dibenarkan, tajuk dan prosiding ini dipinda untuk melibatkan pemohon sebagai intervener dalam prosiding mahkamah yang mulia ini;

(c) Bahawa permohonan defendan dalam saman dalam kamar bertarikh 14 Ogos 2000 untuk membatalkan jualan lelongan seperti dalam kandungan 79 ditolak dengan kos;

(d) Kos untuk dan bersampingan dengan permohonan ini berdasarkan indemniti ditanggung oleh defendan dan dibayar serta merta.

Application For Adjournment Of Enclosure 79

As the outset of the proceeding, counsel for the defendant informed the court that the defendant had no objection to the application by the intervener to intervene in the proceeding (prayer 1 and 2 of encl. 85), but added that the application by the intervener to strike out the defendant's application in encl. 79, (prayer 3 in encl. 85) could only be disposed off after the hearing of encl. 79. Counsel for the defendant then applied the adjournment of the hearing of encl. 79. The reason given in support of that application was that further affidavit (encl. 91) filed by the intervener in support of encl. 85 was served on the defendant the day before. According to counsel for the defendant, the defendant wanted to reply to the allegation made in para. 9 of encl. 91. Counsel for the plaintiff objected to the application for the postponement of encl. 79.

Postponement of cases is wholly within the discretion of the court upon considering the reason given in support of the application and the facts and circumstances of the case *Lee Ah Tee v. Ong Tiow Pheng & 7 Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187.

In order to consider whether the application for postponement of the hearing of encl. 79, should be allowed or not it is necessary to refer to the various affidavits filed in respect of encl. 79 and encl. 85. encl. 79 is supported by the defendant's affidavit (encl. 80). In reply to encl. 80, the plaintiff filed the affidavit deposed to by Teoh Hock Lim (encl. 74A). In reply to encl. 74A,

the defendant filed the affidavit in encl. 74. In answer to this the plaintiff filed the affidavit in encl. 75. The defendant filed two more affidavits; encl. 76 and encl. 89.

Enclosure 85 is supported by the supporting affidavit in encl. 86, in reply to which the defendant filed the affidavit in reply in encl. 90. In answer to encl. 90, the intervener filed further affidavit in encl. 91.

Para. 9 in encl. 91, the paragraph which contains the allegation in respect of which defendant's counsel said he wanted to reply, makes reference to encl. 74A. I found that what para. 5 of encl. 91 in effect does is to repeat what had already been stated in encl. 74A. This is clear from what is stated at para. 9 of encl. 91:

> Mengikut kandungan Afidavit Jawapan THL tersebut (encl. 74A), adalah jelas bahawa pada semua masa yang berkenaan sehingga lelongan awam pada 26.6.2000, defendan diwakili oleh Peguambela & Peguamcara dan semasa lelongan awam pada 26.6.2000 rekod mahkamah yang mulia ini menunjukkan yang peguam defendan ialah Tetuan Bala Gopal dan Associates yang beralamat *di No: 605-A, Taman Melaka Raya, 75000 Melaka (selepas ini dirujuk sebagai Peguam Defendan Lama tersebut) dan segala dokumen, surat, perintah mahkamah dan sebagainya telah disampaikan oleh Peguam Plaintif, iaitu Tetuan Philip Chua & Co. kepada peguam defendan lama tersebut yang semuanya diakui terima oleh Peguam Defendan Lama tersebut.* (emphasis added)

In my judgement what was alleged in encl. 74A (and hence para. 9 of encl. 91) had actually been answered by the defendant in the affidavits filed on its behalf in encl. 74, encl. 76 and encl. 89.

In para. 4 encl. 74, it is stated on behalf of the defendant as follows:

> Bagi menjawab dakwaan plaintif di perenggan 3, 4, 5, 6, 7 dan 8 Afidavit Teoh Hock Lim, saya dinasihati oleh Peguamcara Defendan dan sesungguhnya percaya dan menyatakan bahawa walaupun terdapat surat menyurat di antara Tetuan Bala Gopal & Associates dan Tetuan Philip Chua & Co., ia tidak bermakna plaintif boleh mengabaikan arahan/perintah mahkamah yang dengan khususnya mengarahkan penyerahan Notis Perisytiharan Jualan ke atas Defendan.

In para. 5 of encl. 74 it is stated:

> Saya juga mengatakan bahawa tiada terdapat dalam Perintah Mahkamah arahan atau cara Penyerahan Notis Perisytiharaan Jualan ke atas Tetuan Bala Gopal & Associates. Saya juga dinasihati oleh peguamcara saya dan mengatakan bahawa Tetuan Bala Gopal & Associates adalah peguamcaranya dan jika Notis Perisytiharaan boleh diserahkan ke atasnya, Mahkamah akan memberi arahan menyerahkan ke atas peguamcaranya.

The rest of encl. 74 is as follows:

(6) Bagi jawapan dakwaan plaintif di perenggan 9 Afidavitnya, saya mengatakan bahawa saya tidak mempunyai notis akan lelongan yang ditetapkan pada 26 Ogos 2000. Saya hanya diberitahu mengenai lelongan selepas 26hb. Ogos, 2000 oleh Tetuan Bala Gopal & Associates. Walaupun defendan mempunyai faedah nasihat peguam ia tidak mengecualikan plaintif dari membuat penyerahan ke atas defendan seperti diarahkan oleh mahkamah.

(7) Sebaik sahaja saya diberitahu mengenai lelongan selepas 26hb. Ogos, 2000, saya telah berjumpa dengan Tetuan Bala Gopal & Associates dan pada lebih kurang 5hb. Julai, 2000 saya telah melantik Tetuan Bashir & Co, untuk mewakili defendan dan selepas mendapatkan persetujuan dari Tetuan Bala Gopal & Associates pada lebih kurang 13hb. Julai, 2000 notis penukaran peguamcara telah difailkan. Selepas itu, satu carian telah dibuat di mahkamah yang mulia ini. 4hb. Ogos, 2000, Tetuan Bashir & Co, telah menulis surat kepada Tetuan Philip Chua & Co., dan T. S. Properties untuk mendapatkan nama pembeli tetapi mereka tidak memberitahu nama pembelinya. Oleh yang demikian defendan tidak terlewat untuk memfailkan Saman Dalam Kamar pada 14hb. Ogos, 2000.

(8) Dengan itu saya mengatakan bahawa jualan harta melalui lelongan pada 26hb. Ogos, 2000 adalah tidak teratur kerana kegagalan menyerahkan notis jualan ke atas defendan adalah sesuatu yang fundamental yang menjejaskan hak defendan.

(9) Saya dinasihati oleh Peguamcara Defendan dan sesungguhnya percaya bahawa plaintif dan pembeli harus dianggap dan perlu tahu jualannya adalah tertakluk kepada Perintah Mahkamah yang dikeluarkan pada 17hb. April, 2000. Oleh kerana plaintif sendiri tidak mematuhi perintah tersebut dan pembelinya mengetahui Perintah bertarikh 17hb. April, 2000, maka mereka tidak boleh mendakwa pembeli *bona fide*.

Relying on what had been said in encl. 74, the defendant contended that even though there was correspondence between M/s Bala Gopal & Assocs (the defendant's former solicitor) and the plaintiff's solicitor, and although the proclamation of sale was served on the defendant's former solicitor, that was not service on the defendant itself. Defendant's counsel contended that in law there was no effective service on the defendant. As would be seen later, this was indeed the thrust of the case for the defendant.

In response to this, the plaintiff had filed encl. 75. Although the defendant filed further affidavits in encl. 76 and encl. 89, there was no further specific reference made by the defendant on this point.

The question as to whether the contention of the defendant as stated in encl. 74 could be accepted in support of its application would be answered

when I discuss the merits of encl. 79. But for the purpose of considering whether the defendant's application for postponement should be allowed or not, I was satisfied that what was alleged in para. 9 of encl. 91 had actually been answered by the defendant. So, other then causing unnecessary delay in the disposal of encl. 79, I did not see how an adjournment would serve to further the case of the defendant. In the circumstances I did not allow the application for postponement of encl. 79.

I allowed the application by the intervener to intervene. I made no order on the intervene's application to strike out encl. 79 and I directed the hearing of encl. 79 to proceed as scheduled.

Enclosure 79

As stated in encl. 79, the grounds for the application are as follows:

(a) the plaintiff had failed to comply with the court order dated 17 April 2000;

(b) other reasons as stated in the afidavit filed together with the application.

The court order dated 17 April 2000 ordering the sale by auction to take place on 26 June 2000 states as follows:

> Atas permohonan pihak plaintif tersebut di atas melalui Saman untuk arahan bertarikh 18hb. Januari 2000 dan setelah membaca Saman Untuk Arahan dan setelah mendengar En. Tan Ban Siew peguam pihak plaintif dan En. Bala Gopal Krishnan peguam pihak Defendan maka adalah diperintahkan:
>
> (1) Bahawa tarikh lelongan ditetapkan pada 26 Jun 2000;
>
> (2) Bahawa harga rizab ditetapkan pada RM4,203,000;
>
> (3) Bahawa Sim Choo Lai dari T/n JS Properties beralamat di 20-A Jalan Merdeka, Taman Melaka Raya, 75000 Melaka dilantik sebagai pelelong untuk menjalankan penjualan di Melaka;
>
> (4) Bahawa komisyen sipelelong ditetapkan mengikut Peraturan Tanah Melaka, 1996 melalui MPU 14/1983 sebagai tambahan kepada perbelanjaan yang sebenar dan patut;
>
> (5) Bahawa penjualan di dalam ini diiklankan sekali di dalam suratkhabar "The Star" sekurang-kurang satu minggu sebelum penjualan;
>
> (6) Bahawa satu salinan notis penjualan diserahkan kepada defendan tidak kurang daripada satu minggu sebelum penjualan melalui pos berbayar dahulu;
>
> (7) Bahawa kos Saman Pemula ini dan kos yang berkaitan dengan permohonan ini ditaksirkan dan dibayar daripada keuntungan penjualan kepada peguamcara plaintif; dan

(8) Untuk perintah selanjutnya atau perintah sepertimana timbalan pendaftar dapati sesuai.

Enclosure 80, the supporting affidavit which are supposed to contain the other grounds for the application in encl. 79, was affirmed by Lock Kim Lian, the managing director of the defendant. In this brief affidavit, Lock Kim Lian stated as follows:

(2) Saya dengan hormatnya merujuk kepada Saman Pemula serta Perintah Mahkamah bertarikh pada 17hb. April, 2000 dan sesungguhnya menyatakan bahawa setelah perintah bertarikh 17hb. April, 2000 dibuat, Tetuan Bala Gopal and Associates Peguamcara Defendan tidak lagi mewakili defendan;

(3) Selanjutnya, Perintah Mahkamah bertarikh pada 17hb. April, 2000 dipohon dan diperolehi oleh plaintif. Menurut perintah tersebut, mahkamah telah mengarahkan Notis Penjualan diserahkan kepada defendan tidak kurang daripada satu (1) minggu sebelum penjualan melalui pos berbayar dahulu;

(4) Saya dengan sesungguhnya menyatakan bahawa defendan tidak menerima Notis Penjualan dari mana-mana pihak melalui pos berbayar atau sebaliknya;

(5) Oleh itu, saya mengatakan bahawa plaintif telah gagal mematuhi Perintah Mahkamah bertarikh pada 17hb. April, 2000;

(6) Saya dinasihati oleh peguamcara saya dan sesungguhnya percaya serta menyatakan bahawa kegagalan mematuhi Perintah Mahkamah bertarikh pada 17hb. April, 2000 merupakan suatu kemungkiran fundamental yang tidak boleh diabaikan dan jualan harta pada 26hb. Jun, 2000 adalah tidak sah dan terbatal; dan

(7) Selaras dengan alasan-alasan seperti di atas, saya dengan takzimnya memohon perintah seperti dipohon.

It is clear from encl. 80 that the only ground for the application in encl. 79 is that the defendant did not receive the proclamation of sale, the service of which was ordered in para. 6 of the court order dated 17 April 2000.

Although subsequently the defendant filed two more affidavits; encl. 74, affirmed on 6 September 2000 and encl. 76 affirmed on 30 September 2000, none of these affidavit mentioned any other grounds in support of encl. 79. Then, on 18 December 2000 the defendant filed encl. 89. In paras. 4 and 5 of encl. 89, the defendant for the first time, almost four months after the filing of encl. 79, introduced a new ground. In paras. 4 and 5 of the said affidavit, Lock Kim Lian stated:

Saya dengan hormatnya mengatakan bahawa defendan tidak pernah diserahkan dengan salinan perintah perintah bertarikh 31.7.98 atau 17.4.2000.

Dengan itu jualan jualan harta defendan adalah tidak sah dan ianya nuliti.

The defendant had in those very short paragaraphs introduced a new ground, ie, that it was never served with the order dated 31 July 1998. The order dated 31 July 1998 is the order of sale.

The plaintif and the intervener objected to the new ground and urged the court not to entertain it. The objection by the plaintiff was made by its counsel's in the letter to the court dated 14 December 2000. In the case of the intervener, the objection was contained in its counsel's letter to the court dated 20 December 2000. The two letters also contained the written submission of counsels for the plaintiff and the intervener respectively, urging the court not to entertain the new ground, contending in substance that the affidavit containing this new ground (encl. 89) was filed after the expiry of 14 days after the date of filing of the application in encl. 79, contrary to O. 32 r. 13 (2)(a), Rules of the High Court 1980 (RHC). The cases of *KS Chua & Co v. Chiu Huang Chew* [1995] 4 MLJ 436 and *Hock Thai Finance Corporation Bhd v. Tai Chou Yu* [2000] 5 CLJ 314 were cited in support.

In his reply contained in his letter dated 3 January 2000, counsel for the defendant submitted that since no prior notice of the objection was served on the defendant and that no objection was raised by the plaintiff and the intervener when their counsels submitted orally in court, and since the objection was infact raised after the case was adjourned for decision, the plaintiff and the intervener had waived their right to make the objection. In support learned counsel for the defendant cited the case of *Gentali (M) Bhd v. Kawasaki Sunrock Sdn Bhd* [1996] 4 CLJ 813.

In my view encl. 89 was filed by the defendant with the object of reinforcing and/or supplementing the defendants case affirmed in encl. 80. Therefore encl. 89 was intended to be used in support of the application in encl. 79. As encl. 89 was filed almost four months after encl. 79 was filed, it was clearly out of the time period specified under O. 32 r. 13(2)(a) RHC. Since no formal application was made to file and use encl. 89 out of time, I have no alternative but to decline to entertain the new ground. I do not think that the plaintiff's and the intervener's failure to give notice of their objection or to raise the objection earlier would cure a breach of a strict requirement of the rules of court.

Assuming that the court is wrong in coming to the above conclusion and assuming that what was alleged by the defendant in para. 4 of encl. 89 could be legally raised by the defendant and should be referred to by the court, I do not think that that paragraph has succeeded in changing the ground in support of encl. 79 or adding a new ground thereof. For this I need to refer

to encl. 90, the affidavit in reply affirmed by Lock Kim Lian and filed by the defendan on 7 December 2000. The relevant paragraphs in encl. 90 state as follows:

> (6) Disini saya menyatakan bahawa isu atau alasan untuk mengenepikan lelongan awam pada 26 Jun 2000 adalah bahawa plaintif telah gagal mematuhi perenggan 6 perintah bertarikh 17 April 2000 dan bukannya perkara yang dibangkitkan oleh pencelah di perenggan 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 dan 15 afidavit tersebut yang mana ianya dibangkitkan untuk mengelirukan mahkamah yang mulia ini;
>
> (7) Bagi menjawab dakwaan pencelah di perenggan 16, 17 dan 18 afidavit tersebut saya dinasihati oleh peguamcara saya dan sesungguhnya percaya dan mengatakan bahawa perintah mahkamah bertarikh 17 April 2000 adalah dipohon dan diperolehi oleh peguamcara plaintif dan dibenarkan oleh mahkamah yang mulia ini. Oleh itu ianya perlu dipatuhi dengan sempurna. Selagi perintah tersebut tidak dipatuhi maka lelongan awam pada 26 Jun 2000 adalah cacat fundamental dan remedi pencelah adalah untuk memohon kembalikan wang yang telah dibayar dan jika menanggung kerugian, pencelah perlu menuntut dari plaintif sekiranya ingin berbuat sedemikian.

From what had been affirmed in those paragraphs, it is clear that the complain of the defendant was that the plaintiff had failed to comply with para. 6 of the court order dated 17 April 2000, in that the plaintiff had not served the proclamation of sale on the defendant one week prior to the sale on 26 June 2000. Non-service of the order of sale was never mentioned as a ground in support of encl. 79. If it was indeed really a ground and was intended to be so, it should have been disclosed in encl. 80 (the first affidavit filed in support of encl. 79) or at the latest in encl. 90. If there is still any doubt as to what really is the gravamen of the defendant's case, it is to my mind completely removed by what the defendant had stated at para. 11 of encl. 90:

> Walaubagaimanapun Pencelah tidak boleh melindungi dibawah prinsip "indefeasibility" kerana mereka membeli harta tersebut tertakluk kepada syarat-syarat jualan serta perintah bertarikh 17.4.2000 dan perlu meneliti perintah-perintah jualan dan dapatkan nasihat perundangan bahawa jualan/belian adalah selaras dengan perintah-perintah dan Perisytiharaan Jualan. Dalam Perisytiharaan jualan jualan adalah menurut Perintah-perintah bertarikh 31.7.1998 dan 17.4.2000. **Oleh itu isu sebenarnya adalah Perintah 17.4.2000 tidak dipatuhi dan bukan soal "indefeasibility"**. Disertakan sesalinan Perisytiharaan Jualan yang ditandakan sebagai eksibit "LKL-8".

In the above paragraph the defendant made it clear that the real issue is non compliance with the court order dated 17 April 2000. However for completeness, in relation to the order of sale, it must be pointed out that

counsel for the defendant in his submission in reply to the submission of counsels for the plaintiff and the intervener, confirmed that the defendant was not seeking to set aside the order of sale, but the auction sale on 20 June 2000. In other words, the defendant was not challenging the order of sale but using the alleged non-service of the order of sale to attack the auction sale. Even if the feeble and belated attempt by the defendant to introduce the alleged non-service of the order of sale (in para. 4 of encl. 89) could be considered by the court, for reason which I will set out shortly, in the circumstances of this case, I fail to see how this ground could successfully set aside the auction sale carried out on 26 June 2000. The law on this point is clear. In order to set aside the auction, the defendant must show that there was a failure on the part of the plaintiff which contravened a substantive statutory prohibition rendering the auction sale null and void on the ground of illegality or lack of jurisdiction. The inherent and discretionary jurisdiction to set aside the auction sale should not be applied if the failure on the part of the plaintiff was a defect which had contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also only be exercised judicially in exceptional cases where the failure on the part of the plaintiff was of such a serious nature that there is a real need to set aside the auction sale to enable the court to do justice. (*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, at 409, *Selvam Holding (M) Sdn Bhd v. Grant Kenyon & Ekhardt Sdn Bhd, BSN Commercial Bank (M) Bhd & Ors (Interveners)* [2000] 3 CLJ 16). So the question in relation to the order of sale is, had the defendant established such a failure on the part of the plaintiff? In this case it could not be disputed that after 31 July 1998 but before the auction was carried out on 20 June 2000, the court had fixed three dates for auction to be carried out pursuant to three separate court orders made following summons for direction. The three court orders, dated 3 March 1999, 17 June 1999 and 28 September 1999 were made *inter parties*, and on all three occasions the defendant was represented by counsel. On 3 March 1999, one Patricia Chan Chew Yen appeared for the defendant and on 17 June 1999 and 28 September 1999, Bala Gopal appeared for the defendant. There is nothing to show that the defendant had, on any of the three occassions, made any objection to the sale of the land by public auction on the ground that auction could not be carried out because the defendant had not been served with the order of sale by the court or the plaintiff's solicitor, or made any complaint at all regarding the non-service of the order of sale. All these facts are adduced by the affidavits filed by the plaintiff and the intervener. The defendant had not, in any of its affidavits denied any of those facts or adduced evidence to the contrary. Indeed there is evidence (exh. THL3, THL4 and THL5, encl. 74A) from which inference could be made that the defendant had initially preferred an appeal to the Court of Appeal but subsequently this was discontinued. As I have stated earlier, all that the

defendant did was to say in para. 4 of encl. 89 that "saya dengan hormatnya mengatakan bahawa defendan tidak pernah diserahkan dengan salinan perintah perintah bertarikh 31.7.98 atau 17.4.2000". It was convenient and easy indeed for the defendant to make this assertion. If the defendant really had not been served with the order of sale, then this could and should have been raised by its counsel in the summons for directions proceeding on 3 March 1999. If this had not been raised on 3 March 1999, then the non-service of the order of sale could still be and should have been raised in the proceedings on 17 June 1999, 28 September 1999 or 17 April 2000.

But there is no evidence to show that the defendant had raised the matter regarding the non service of the order of sale earlier on or in any of those proceedings. It was only after some two years, on 8 December 2000 (when encl. 89 was affirmed) that the defendant appeared to have remembered about the non-service of the order of sale. Why this is so is beyond comprehension and no explanation was offered by the defendant. Having considered this bare assertion in the light of the facts and circumstances relating to the making of the three court orders (dated 3 March 1999, 17 June 1999 and 28 September 1999) which I have adverted to above, I must reject the allegation of the defendant (that he was never served with the order of sale) as being inherently improbable. Considering all those facts as a whole I conclude that in all probability the defendant must have been served with the order of sale. I hasten to add that being represented by counsel on 31 July 1998 when the order of sale was made and on four subsequent occasions (3 March 1999, 17 June 1999, 28 September 1999 and 17 April 2000), the defendant cannot now be heard to say that it did not know what the order of sale was all about.

So, the issue for the court to consider is really whether or not the proclamation of sale had been served on the defendant one week before the sale as ordered in para. 6 of the Court Order dated 17 April 2000?

Whether Proclamation Of Sale Was Served On The Defendant

Learned counsel for the defendant contended that the proclamation sale (notis jualan) was not served on the defendant as ordered by the court on 17 April 2000. He contended that service on M/s Bala Gopal & Assocs and Solicitor was not good service. In the alternative, learned counsel for the defendant also contended that even if the service on M/s Bala Gopal would have been good service, the plaintiff had failed to show that the proclamation of sale was served on M/s Bala Gopal. Since the proclamation of sale was not served on the defendant, there was a breach of the mandatory statutory requirement under s. 258(1) of the National Land Code (NLC). The sale by auction on 26 June 2000 (not the order for sale) was null and void and had no effect. This is the thrust of the submission of counsel for the defendant.

In support he relied on *Khor Kim Yong v. Public Bank Bhd & Anor* [1998] 1 CLJ 668. He also relied on *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15.

In reply, learned counsel for the intervener submitted that a body corporate could only act through a solicitor. Order. 12 r. 1(2) of RHC was cited in support. The proclamation of sale was served on defendant's former solicitor, M/s Bala Gopal & Co. Since a solicitor is the alter-ego of his client, it was submitted that the service on M/s Bala Gopal was a good service on the defendant. Hence the court order dated 17 April 2000 had been complied with. In support counsel for the intervener cited *Aik Meng (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639, *Dixon v. Winch* [1900] 1 CH 736 and *Legione And Another v. Hateley* [1982-1983] 152 CLR 406.

I have already dealt the issue of the alleged non service of the order dated 31 July 1998. I turn next on the issue of non service of the proclamation of sale on the defendant. In order to succeed on this ground the defendant must show that the failure to serve the proclamation of sale has contravened a substative statutory prohibition as to render the auction sale null and void on ground of illegality or lack of jurisdiction, or that failure amount to a defect of serious nature that there is a real need to set aside the defective auction sale to enable the court to do justice *(Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75).

Procedure prior to sale is provided under s. 258 of the NLC where s. 258(1) provides that:

> Where any such order (order of sale) has been made, it shall be the duty of the Registrar of the court:
>
> (a) to serve a copy thereof on the chargor, and on every chargee of the land or lease in question; and
>
> (b) to see that the sale is publicly advertised in accordance with rules of court or, in the absence of any rule on that behalf, the practice customarily adopted in the state.

It is clear that under s. 258(1)(b) of the NLC, it is necessary for the sale to be publicly advertised in accordance with the rules of court or the practice customarily adopted in the state. That this had been complied with was not disputed by the defendant. In fact exh. ALI, encl. 91 clearly shows that the sale on 26 June 2000 was advertised as required under the NLC. The defendants contended that the proclamation of sale was not served on it. However, s. 258 (1)(b) of the NLC does not require the proclamation of sale to be served on the defendant. No other provision in the NLC or any law

requiring the proclamation of sale to be served on the defendant had been identified. So I do not see how it could be established that the non-service of the proclamation of sale (if proven) would constitute a breach of a statutory provision. But the defendant contended that the order dated 17 April 2000 directed that the proclamation of sale be served on the defendant one week before the sale. The defendant contended that being the chargor of the said land, the defendant had the right to tender payment. So if the defendant was not informed of the date of the sale, that right of the defendant would be affected. This would render the sale on 20 June 2000 null and void and must be set aside.

In the case of *Legione And Another v. Hateley* [1982-83] 152 CLR the High Court of Australia said at p. 421:

> The solicitor is to be regarded as the alter ego of the client and the rights of the other party to the contract cannot be made to depend upon the diligence or lack of diligence exhibited by the solicitor in his dealing with his client: *Sargent v. ASL Developments Ltd*.

In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639, citing the relevant passage from the judgment of the Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, the Court of Appeal said at p. at 821:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of 'the client. The only exception to this is where the solicitor acts fraudulently vis his client. I cite once again from Doshi (at p. 88):
>
> Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. Thus in *Rolland v. Hart* [1870] Ch App 678, 681 which was followed by the High Court of Australia in *Stuart v. Kingston* [1923] 32 CLR 309 Lord Hatherley LC said:
>
> > Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has no notice of that which his agent has actual notice of. The purchaser of an estate had, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior encumbrance because he was not told of it by his solicitor.
>
> In *Bradley v. Riches* [1878] 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.

There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd edn) Vol 14, para 1019 (at p. 543) as follows:

> Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.

In the light of these authorities, I hold that the sale by public auction on 26 June 2000 was a matter which must necessarily be part of the duty of the defendant's former solicitor to be aware of or inform himself. So, the notice about the public auction on 26 June 2000 by the service of the proclamation would constitute actual notice on the defendant. Hence, the service of the proclamation of sale on the defendant's former solicitor would in law amount to service of the said proclamation on the defendant complying sufficiently with para. 6 of the court order dated 17 April 2000.

In this case from the evidence adduced it is clear and in fact not disputed by the defendant that M/s Bala Gopal & Assocs, Advocs & Solicitors was the defendant's former solicitor. The evidence also established that Bala Gopal appeared for the defendant in court on 17 June 1999, 28 September 1999 and 17 April 2000. According to the defendant's own affidavit (encl. 74), on 5 July 2000 the defendant had appointed M/s Bashir & Co to represent the defendant and after obtaining the consent of M/s Bala Gopal & Co, the defendant had on 13 July 2000, filed the notice of change of solicitor (encl. 77). But the defendant contended in the alternative that the plaintiff had not shown that the proclamation of sale was served on Bala Gopal. In order to resolve the issue as to whether M/s Bala Gopal was served with the proclamation of sale, I need only refer to encl. 74A. At para. 7 of that affidavit, the plaintiff's manager had affirmed as follows:

> Dalam pada itu, plaintif telah pada 5.6.2000, melalui surat bertarikh 2hb. Jun 2000 menyerahkan satu Notis Penjualan kepada Tetuan Bala Gopal & Associates, untuk memberitahu defendan melalui peguamcaranya akan tarikh lelongan pada 26.6.2000 akan syarat-syarat dan terma-terma lelongan tersebut.

> Sesalinan surat bertarikh 2.6.2000 kepada Tetuan Bala Gopal & Associates dilampirkan dan dieksibitkan sebagai THL9.

Exhibit THL9, encl. 74A (the letter dated 2 June 2000) which was sent by hand to M/s Bala Gopal & Assocs states that; "Bersama-sama ini kami kembarkan satu salinan "Peristiharaan Jualan" sebagai serahan ke atas tuan sebagai peguamcara pihak defendan". That letter bears an endorsment that Bala Gopal & Assocs Advocs & Solicitor had acknowledged receipt of the document (ie, the proclamation of sale) on 5 June 2000. Did the defendant adduce any evidence to counter this? I have sieved through the affidavit evidence filed by the defendant in this case but I find none to dispute that crucial fact. It is trite law that where one party makes a positive assertion upon a material issue, the failure on his part to contradict it is usually treated as an admission by him of the fact so asserted (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). The case before me is no exception. I therefore have no hesitation in concluding that the proclamation of sale in respect of public auction on 26 June 2000 was in fact served on M/s Bala Gopal & Assocs, the defendant's former solicitor on 5 June 2000. Since on the date of service of the said proclamation, M/s Gopal & Assocs was still on record the defendant's solicitor, the service was good service. Support for this can be found in *Lady De Pole v. Dick* [1885] 29 Ch.D 351 and *Getz Brothers & Co GMBH v. Pan Malaysia Wood Products Sdn Bhd* [1980] 2 MLJ 79. The brief facts of *Lady De La Pole*'s case as stated in the report are as follows:

By order on further consideration the defendant was ordered to pay money into court, which was then to be carried to the credit of an action for administering the estate of a testator whose executrix was the plaintiff in the present action. The defendant went abroad without complying with the order. On appeal the order was varied by ordering the defendant to pay the money to the plaintiff, who was then to pay it into court in the administration action, such an order being capable of being better en-forced against the defendant's property than the order as originally framed.

The notice of appeal was served on the defendant's solicitor, who stated that they had ceased to act for him, but they were still his solicitor on the record.

It was held that as the order on further consideration, had not been worked out, they still represented him, and that the service of the notice on them was good service. At p. 356 Cotton LJ said:

> In the present case, however, I think it clear that, the fruits of the judgement not having been obtained by the Plaintiff, there still was a duty imposed on the Defendant's solicitor on the record as between himself and his client, so

far as the client had not discharged him, and also as regards the other side, so as to make service upon him good service. The neglecting to change a solicitor when he ceases to act does not discharge him. Rolle, C.J., lays down in *Lawrence v. Harrison* (2) a principle on which we may act. He says, "The only question is, whether the warrant of attorney be determined by the judgement given in the suit wherein he was retained; and I conceive it is not, for the suits is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution". According to the principle, until the judgment has been worked out, there is a duty imposed on the solicitor on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharged him but substitutes another solicitor on the record. Therefore, without deciding whether the representation continues so long as the right of appeal exists, we hold that in the present case the Defendant's solicitor on the record did continue to represent him, and that the service was good.

In *Getz Brothers & Co GMBH v. Pan Malaysian Wood Product Sdn Bhd* [1980] 2 MLJ 79, at p. 79 the Federal Court said:

The procedure for a solicitor to obtain a discharge is laid down in Order 7, rule 4, Rules of the High Court, 1957. In the first place, the solicitor making a discharge must serve a notice of his application on the party from whom he now seeks an order of court for him to cease to act. This the solicitor did not do until the matter came up for hearing. The hearing had then to be adjourned until after their compliance with this requirement. Then on May 31, 1974, the solicitor obtained an *ex parte* order. With this order, which they did not at any time extract and have not up to this moment extracted, the solicitor considered themselves discharged and out of the picture. But that rule specifically states that unless and until the solicitor has (1) served on every party to the cause or matter (not being a party in default as to entry of appearance) a copy of the said order, and (2) procured the order to be duly entered and filed, and (3) filed a certificate signed by him that the order has been duly served as aforesaid, he shall, subject to a change of solicitors by feasance or to the contingency of the death, bankruptcy etc. of the solicitor, be considered the solicitor of the party to the final conclusion of the cause or matter whether in the High Court or in the Federal Court. The terms of this rule are clear and explicit. Since there has been no change of solicitor executed by the appellants or by any other firm of solicitors and the contingency of death, bankruptcy etc. set out in rule 3 had not occurred, M/s. Skrine & Co. who had entered an appearance for the appellants, remain the solicitor on record up to the present moment.

Counsel for the defendant relied heavily on *Khor Kim Yong v. Public Bank*. It is true that in that case too the sale by auction was challenged. But on the facts that case can be distinguished. Apart from the failure of the defendant in that case to inform the plaintiff of the auction dates, the sale by auction was also challenged on three other grounds in respect of which the court found for the plaintiff: (i) the failure by the 1st defendant to serve the order for sale on the plaintiff (ii) the failure by the 1st defendant to inform the plaintiff of the adjourned date for hearing of the summons for direction and (iii) the failure of the 1st defendant to serve the valuation report on the plaintiff. In respect of the alleged failure of the 1st defendant to inform the plaintiff of the auction dates, the court ruled against the plaintiff because the court found that the date of the auction which resulted in the selling of the property, had been advertised in the newspaper. Whereas in the case before me the challenge of the defendant was mainly based on the alleged non service of the proclamation of sale on the defendant. Regarding this, as explained earlier, it has been established that the date of the auction on 26 June 2000 was advertised in the newspaper and that the proclamation of sale was served on the defendant's solicitor at the material time. On the alleged service of the order of sale on the plaintiff, the court in *Khor Kim Yong v. Public Bank* (*supra*) found that the lst defendant was deemed to have accepted the assertion that the order of sale was not served on the plaintiff because of failure by the lst defendant to dispute the allegation of the plaintiff. This is different from the case before me in which as stated earlier, I have concluded that even if the defendant's belated bare assertain in para. 4 in encl. 89 could be considered as a ground, from the affidavits filed by the plaintiff and the intervener and the relevant documents exhibited, there are ample undisputed facts to entitle this court to come to the unmistakable finding that in all probability the order of sale was served on the defendant.

Conclusion

In my judgment this is clearly not a case in which there has been a defect amounting to a blatant defiance of a substantive statutory prohibition rendering the sale by auction on 26 June 2000 null and void on the ground of illegality or lack of jurisdiction. This is also not a case in which there had been a defect of such a serious nature that warrants the exercise of inherent jurisdiction to set aside the said sale by auction, to enable the court to do justice.

In the circumstances the defendant's application in encl. 79 is dismissed with cost. No order is made on the prayer in encl. 85 to strike out encl. 79 because in the circumstances such an order is unnecessary.